Supreme Court, U.S.
FILED
DEC 3 - 2014
OFFICE OF THE CLERK

No. 14-280

IN THE
SUPREME COURT OF THE UNITED STATES

◊

HENRY MONTGOMERY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent,

◊

On Petition for Writ of Certiorari to the Louisiana Supreme Court

◊

BRIEF IN OPPOSITION

◊

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STATEMENT OF THE CASE

QUESTION PRESENTED FOR REVIEW

Whether *Miller v. Alabama,* 567 U.S. --, 132 S.Ct. 2455 (2012), is retroactive to persons whose convictions and sentences are final and who are seeking collateral review, pursuant to this Court's opinion in *Teague v. Lane,* 489 U.S. 288 (1989).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 13, 1963, Petitioner Henry Montgomery murdered police officer Charles H. Hurt, an East Baton Rouge Deputy Sheriff. *State v. Montgomery,* 181 So.2d 756, 757 (1966). At the time of the crime, Petitioner was over the age of seventeen but not yet eighteen years old. *Id.*

On November 18, 1963, Petitioner was indicted for capital murder. *State v. Montgomery,*

242 So.2d 818, 818 (1970); La. Rev. Stat. § 14:30 (1963). He was tried, convicted and sentenced to death. *Montgomery,* 242 So.2d at 818. On January 17, 1966, the Louisiana Supreme Court reversed the conviction and sentence and ordered a new trial. *Id.*

Between trials, Petitioner escaped from parish jail. *Id.* at 818. He was later apprehended. *Id.* Petitioner's second trial commenced on February 6, 1969. He was again found guilty of murder, the jury returning a verdict of guilty without capital punishment. *Id.*[1] Petitioner was sentenced to a term of imprisonment for the remainder of his natural life. His conviction and sentence were affirmed. *Montgomery,* 242 So. 2d at

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[1] *See also* La. Rev. Stat. § 14:30 cmt. (explaining that although the prohibition on murder in Louisiana originally required an automatic imposition of the death penalty, subsequent law allowed the jury to qualify its verdict "'guilty without capital punishment' in which case the punishment was imprisonment at hard labor for life.)

818, 820. Rehearing was denied on December 14, 1970. *Id.* at 818. Pursuant to Louisiana law, Petitioner's conviction and sentence became final on that date. La. Code Crim. Proc. art. 922(D) (1970).

Petitioner collaterally attacked his conviction on multiple occasions. The state courts denied relief in 1971, 1995, 1999, and 2001.

Petitioner then filed a *pro se* motion to correct illegal sentence on July 13, 2012, arguing *Miller* retroactively applied to his case. The district court denied the motion on January 30, 2013, finding that *Miller* was not retroactive pursuant to *Teague*. Petitioner timely sought supervisory writs. Jurisdiction of the case was transferred to the Louisiana Supreme Court because Petitioner's sentence was imposed prior to July 1, 1982. La.

Const. art. V, § 5(E). The state supreme court denied writs on June 20, 2014, relying upon its opinion in *State v. Tate,* 2012-2763 (La. 11/05/13), 130 So. 3d 829, *reh'g denied* (La. 01/27/14), *cert. denied,* 134 S. Ct. 2663, 189 L. Ed. 2d 214 (2014). Petitioner filed the instant petition for a writ of certiorari on September 5, 2014. This Court ordered the State to respond by December 3, 2014. The State submits the instant response.

JURISDICTION

As a matter of state law, the Louisiana Supreme Court has adopted the *Teague* standard to determine whether a new constitutional rule must be applied retroactively to cases on collateral review. *State ex rel. Taylor v. Whitley,* 606 So. 2d 1292, 1296 (La. 1992) (adopting *Teague v. Lane,* 489 U.S. 288 (1989)).

Petitioner claims that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The question presented is whether *Miller v. Alabama,* 567 U.S. --, 132 S.Ct. 2455 (2012), a decision interpreting the Eighth Amendment of the United States Constitution, must apply to Petitioner as a matter of the "basic norms of constitutional adjudication." *Teague,* 489 U.S. at 304 (quoting *Griffith v. Kentucky,* 479 U.S. 314, 322 (1987)).

The textual basis for this Court's authority to determine what the "basic norms of constitutional adjudication" are comes from Article III, Section 1 of the United States Constitution, vesting "[t]he judicial Power of the United States" with this Court. *See Griffith,* 479 U.S. at 322. The judicial power of this Court necessarily includes the determination of whether new pronouncements of

the United States Constitution must be applied to cases that have already become final. *Compare Danforth v. Minnesota*, 552 U.S. 264, 266, 271, 288 (2008). Absent this Court's intervention, a State seeking review of a judicial misconstruction of the federal standard enunciated in *Teague* has no redress in federal habeas.

Because Louisiana has adopted *Teague* the Louisiana Supreme Court's determination as to whether *Miller* is retroactive pursuant to *Teague* renders its decision "interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Here, the Louisiana Supreme Court "decided the case the way it did because it believed that federal law [would require] it to do so." *Id.* at 1041.

SUMMARY OF ARGUMENT

Petitioner suggests that because this Court found Kuntrell Jackson was entitled to relief in the *Miller* case, that finding is dispositive on the retroactivity issue because Jackson's case came to this Court through state collateral review. Pet. for Cert. at 13–14; *Miller,* 132 S. Ct. at 2475. This initial argument is unpersuasive.

Petitioner is not "similarly situated" to Jackson because the State raised the *Teague* bar in this case. *Teague,* 489 U.S. at 300. Arkansas failed to raise the *Teague* bar in Jackson's case, entitling this Court to reach the merits in that case without any application of *Teague*. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.") (Citation omitted). Further, this

Court has announced new rules of constitutional law on collateral review and later found them to be not retroactive. *Chaidez v. United States,* 133 S. Ct. 1103 (2013). Finally, this Court in *Miller* did not, through a holding, declare the opinion applies retroactivity. *Tyler v. Cain,* 533 U.S. 656, 663 (2001).

Another disagreement between Petitioner and the State concerns application of the primary conduct exception, which affords retroactivity to certain substantive rules. *Teague*, 489 U.S. at 311; *Schriro v. Summerlin,* 542 U.S. 348, 351–53 (2004). *Miller* does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish – murder is still illegal, and a life sentence without benefit of parole for juvenile murders is still legal. Nor does *Miller* carry a

significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. *Miller* does not alter the range of conduct the State may proscribe, nor does it affect the class of persons subject to the prohibitions on murder. To the contrary, *Miller* merely regulates the manner of determining the culpability of a juvenile who commits murder: *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

The final disagreement in this case concerns whether the "strands of precedent" referenced by

this Court in *Miller* demand a finding of retroactivity. Pet. for Cert. at 10–13. They do not. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

ARGUMENT

INTRODUCTION

At the outset, both the State and Petitioner find some common ground on the application of *Teague* to this case.

The parties agree that Petitioner's conviction and sentence became final prior to *Miller*. *See* Pet. for Cert. at 2–3. The parties also agree that *Miller* announced a new rule of constitutional law; or, stated differently, that existing precedent did not

compel the result in *Miller*. *Bohlen*, 510 U.S. at 390; Pet. for Cert. at 5; *compare Chaidez*, 133 S. Ct. at 1105–13.

This Court must determine whether one of the two exceptions to *Teague's* general presumption of non-retroactivity should apply to Petitioner's case, which is on collateral review. *Teague*, 489 U.S. at 310. The parties differ on the application of the *Teague* exception at issue.

Under *Teague*, a new constitutional rule should be applied retroactively if it places either "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or creates a new, substantive constitutional rule. *See Teague*, 489

U.S. at 311 (citation omitted); *Summerlin,* 542 U.S. at 351–53.

Teague's second exception applies to watershed rules of criminal procedure that are "implicit in the concept of ordered liberty," and must create "an impermissibly large risk that the innocent will be convicted." *Teague,* 489 U.S. at 311–12 (citations omitted).

Petitioner does not argue that the exception concerning "watershed rules of criminal procedure" applies to this case. *Graham v. Collins*, 506 U.S. 461, 478 (1993) (citation omitted); Pet. for Cert. at 5 n.5. The issue will not be considered.[2]

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[2] Because *Miller* dealt with a sentencing issue, the watershed exception does not apply: "[W]e operate from the premise that such procedures would be... central to an accurate determination of innocence or guilt...'" *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 313).

The State recognizes the split of authority on the retroactivity issue before this Court. Multiple state[3] and federal[4] courts have found *Miller* not

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[3] *Williams v. State*, -- So. 3d --, 2014 WL 1392828 (Ala. Crim. App. Apr. 4, 2014); *Anderson v. State*, 105 So. 3d 538 (Fla. 5th Dist. Ct. App. 2013) (*Miller* not retroactive, although not applying *Teague*); *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st Dist. Ct. App. 2012) (same); *Geter v. State*, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012) (same); *Ellmaker v. State*, 329 P.3d 1253 (Kan. Ct. App. 2014) (unpublished); *Tate*, 130 So. 3d at 829; *People v. Carp*, 852 N.W.2d 801, *reh'g denied sub nom. People v. Davis*, 854 N.W.2d 710 (Mich. 2014); *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Brooks v. Bowersox*, -- S.W.3d --, 2014 WL 5241645 (Mo. Ct. App. Oct. 15, 2014) (*Miller* not retroactive, although not applying *Teague*); *Com. v. Cunningham*, 81 A.3d 1 (Pa. 2013), *cert. denied sub nom. Cunningham v. Pennsylvania*, 134 S. Ct. 2724 (2014).

[4] *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013), *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) (unpublished); *Malvo v. Mathena*, No. 13–375, 2014 WL 2808805 (E. D. Va. June 20, 2014); *Dumas v. Clarke*, No. 13–398, 2014 WL 2808807 (E. D. Va. June 20, 2014); *Stewart v. Clarke*, No. 13–388, 2014 WL 2480076 (E. D. Va. Mar. 13, 2014), *report and recommendation adopted*, 2014 WL 1899771 (E. D. Va. Apr. 29, 2014); *Landry v. Baskerville*, No. 13–367, 2014 WL 1305696 (E. D. Va. Mar. 31, 2014); *Thompson v. Roy*, No. 13–1524, 2014 WL 1234498 (D. Minn. Mar. 25, 2014); *Sanchez v. Vargo*, No. 13–400, 2014 WL 1165862 (E. D. Va. Mar. 21, 2014); *Contreras v. Davis*, No. 13–772, 2013 WL 6504654 (E. D. Va. Dec. 11, 2013); *Johnson v. Ponton*, No. 13–404, 2013 WL 5663068 (E. D. Va. Oct. 16, 2013); *Martin v. Symmes*, No. 10–4753, 2013 WL 5653447 (D. Minn. Oct. 15, 2013); *Ware v.*

retroactive on collateral review. Other state[5] and federal[6] courts have, on the other hand, found *Miller* to be retroactive.

King, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S. D. Miss. Sept. 5, 2013).

[5] *In re Rainey*, 168 Cal. Rptr. 3d 719 (Cal. App. 2014), *review granted*, 326 P.3d 251 (Cal. 2014); *Cotto v. State*, 141 So.3d 615 (Fla. 4th Dist. Ct. App. 2014), *reh'g denied* (*Miller* retroactive, although not applying *Teague*); *Toye v. State*, 133 So.3d 540 (Fla. 2d Dist. Ct. App. 2014) (same); *Illinois v. Davis*, 6 N.E.3d 709 (Ill. 2014), *cert. denied*, No. 13A1227, 2014 WL 4094821 (2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Nebraska v. Mantich*, 842 N.W.2d 716, *cert. denied*, 135 S. Ct. 67 (2014); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655 (2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2013), *reh'g denied*; *Petition of State*, -- A.3d --, 2014 WL 4253359 (2014); *Darden v. State*, No. M2013-01328-CCA-R3-P3, 2014 WL 992097 (Mar. 13, 2014) (unpublished), *appeal denied* (applying a state standard identical to *Teague* on this issue); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014); *Aiken v. Byars*, -- S.E.2d. --, 2014 WL 5836918 (2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014).

[6] *Grant v. United States*, No. CIV.A. 12-6844 JLL, 2014 WL 5843847 (D.N.J. Nov. 12, 2014); *Songster v. Beard*, No. 04–5916, 2014 WL 3731459 (E. D. Pa. July 29, 2014); *United States v. Orsinger*, No. 01–1072, 2014 WL 3427573 (D. Ariz. July 15, 2014); *McLean v. Clarke*, No. 13–409, 2014 WL 5286515 (E. D. Va. June 12, 2014); *Flowers v. Roy*, No. 13–1508, 2014 WL 1757884 (D. Minn. Feb. 3, 2014), *report and recommendation not adopted*, No. CIV. 13-1508 JNE/SER, 2014 WL 1757898 (D. Minn. May 1, 2014); *Pete v. United States*, No. 03–355, 2014 WL 88015 (D. Ariz. Jan. 9, 2014); *Alejandro v. United States*, No. 13–4364, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013); *Hill v. Snyder*, No. 10–14568, 2013

THE PROCEDURAL POSTURE OF KUNTRELL JACKSON'S CASE

Petitioner suggests that this Court's determination that Kuntrell Jackson was entitled to relief in *Miller* is dispositive on the issue of retroactivity because Jackson's case came to this Court through Arkansas state collateral review. Pet. for Cert. at 13–14; *Miller*, 132 S.Ct. at 2475.[7]

Petitioner is not "similarly situated" to Jackson. Unlike Jackson, the State raised the *Teague* bar. *Teague*, 489 U.S. at 300. In *Miller*, Arkansas failed to raise the *Teague* bar in

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WL 364198 (E. D. Mich. Jan. 30, 2013). The State has not included federal circuit courts of appeals that have only granted leave for a petitioner to file a successive habeas petition, as those determinations only involve whether the petitioner has made a prima facie showing.

[7] Jackson is entitled to the benefit of this Court's opinion in his own case. *Jackson v. Norris*, 426 S.W.3d 906, 910 (2013) (citing *Yates v. Aiken*, 484 U.S. 211, 218 (1988)).

Jackson's case.[8] This Court was entitled to reach the merits without any application of *Teague* to Jackson. *Bohlen*, 510 U.S. at 389 ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citation omitted).[9] Had Arkansas raised the *Teague* defense in Jackson's case, this Court would have been bound to apply it. *Goeke v. Branch*, 514 U.S. 115, 117 (1995).[10] Petitioner has not and cannot point to any subsequent case by this Court that contradicts

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[8] Brief of Respondent, *Jackson v. Hobbs*, 2012 WL 523347 (U.S. 2012); Respondent's Brief in Opposition, *Jackson v. Hobbs*, 2011 WL 5373676 (U.S. 2011).

[9] Although *Teague* and *Penry v. Lynaugh* suggest that courts are bound to apply *Teague* even if it is not raised, later rulings, such as *Bohlen*, have clearly clarified or altered that requirement where *Teague* was not raised by the State. *Penry*, 492 U.S. 302, 313 (1989) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Teague*, 489 U.S. at 314–316.

[10] Arkansas state courts have never adopted nor discussed *Teague* in any available opinion on Westlaw. The last time retroactivity was discussed in an Arkansas state criminal case was 1967. *See Rowe v. State*, 419 S.W.2d 806 (1967). Arkansas was not required to assert the *Teague* bar by virtue of the *Danforth* decision. *Danforth*, 552 U.S. 264.

these clear statements. *See e.g. Day v. McDonough,* 547 U.S. 198, 206 (2006).

Moreover, this Court recently held that the rule announced in *Padilla v. Kentucky,* 559 U.S. 356 (2010), did not apply retroactively, notwithstanding the fact that *Padilla* was decided on collateral review. *See Chaidez,* 133 S. Ct. at 1113. This Court made neither *Padilla* nor *Miller* retroactive to cases on collateral review because it did not hold them to be retroactive. *Tyler,* 533 U.S. at 663; *see also Tate*, 130 So. 3d at 833 n.1.

THE PRIMARY CONDUCT EXCEPTION

This case involves application of the primary conduct exception, which affords retroactivity to a very limited class of newly announced substantive rules. *Teague,* 489 U.S. at 311 (discussing *Mackey*

v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).[11] This Court has defined the scope of this exception:

> This [exception] includes decisions that narrow the scope of a criminal statute by interpreting its terms... as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish... Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.
>
> * * *
>
> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes... In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural.

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[11] This Court has also described substantive rules as not subject to the *Teague* bar at all, rather than treated as an exception. *Summerlin,* 542 U.S. at 352 n.4.

Summerlin, 542 U.S. at 351–53 (citations and footnote omitted, emphasis in original).

Miller does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish – murder is still illegal. Nor does *Miller* carry a significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. *Miller* did not alter the range of conduct the State may proscribe, nor did it affect the class of persons subject to the prohibitions on murder.

What *Miller* did was regulate the procedure for determining the culpability of a juvenile who

commits murder: *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Simply put, life without benefit of parole is still a legal sentence for juvenile murderers

The Louisiana Supreme Court dutifully applied this Court's analysis set forth in *Summerlin* and correctly found that *Miller* did not announce a substantive rule, as that term has been defined by this Court. *Tate*, 130 So. 3d at 836–37.

Petitioner has strained to make a square peg fit in a round hole. He argues that this Court categorically prohibited a punishment: a mandatory sentence of life without parole ("LWOP"). *See* Pet. for Cert. at 7. Petitioner's

argument displays a fundamental misunderstanding of the term "punishment:"

> *Miller* did not prohibit any category of punishment for juveniles. Punishment is defined as "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law." *Black's Law Dictionary* 1353 (9th ed. 2009). And Black's Law Dictionary cross-references "punishment" with "sentence," which is defined as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer <a sentence of 20 years in prison>." *Id.* at 1485. *Miller* did not prohibit the punishment of life imprisonment without the possibility of parole for juvenile offenders, but only the mandatory procedure by which that punishment had been imposed. 132 S.Ct. at 2469. The attempt of Judge Barkett's dissent to define the word "punishment" to include a "mandatory life sentence" is contrary to the ordinary legal meaning of that word. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The*

> *Interpretation of Legal Texts* 73 (2012) ("[W]hen the law is the subject, ordinary legal meaning is to be expected ...."). A juvenile offender who serves a life sentence without the possibility of parole imposed under a mandatory sentencing scheme receives the same punishment as a juvenile offender who serves a life sentence without the possibility of parole imposed under a discretionary sentencing scheme.

Morgan, 717 F.3d at 1192 (Pryor, J., respecting the denial of rehearing en banc); *see also Ex parte Maxwell,* 424 S.W.3d at 77 (Keasler, J., dissenting ("I am unaware of any defendant being sentenced to 'mandatory life without parole,' at least not in Texas. The sentence is life without parole.")).

Petitioner next argues that the elements of proof required to impose a life sentence without parole have changed. Pet. for Cert. at 8, n.8. As proof, Petitioner points to the 2013 Regular Session

of the Louisiana Legislature which enacted, among other things, "La. C.Cr.P. art. 878.1, implementing the *Miller* decision in Louisiana..." *State v. Jones,* 2013-2039 (La. 02/28/14), 134 So.3d 1164, 1164. However, in *Tate,* the Louisiana Supreme Court declared that La. Code Crim. Proc. art. 878.1 does not apply retroactively to cases on collateral review. 130 So. 3d. at 841-44. Louisiana's statute was enacted to implement *Miller* prospectively. Assuming art. 878.1 created a new element of proof (which it does not), then resolution would be an issue of state law. *See e.g. State v. Fletcher*, No. 49,303–KA (La. App. 2 Cir. 10/01/14), -- So.3d --, 2014 WL 4853122, at *4–15. (Neither *Miller* nor art. 878.1 create a new element of proof); *People v. Palafox*, -- Cal.Rptr.3d --, 2014 WL 5511372, at *13 (Cal. Ct. App. Nov. 3, 2014). Petitioner's

assessment of retroactivity of a state statute is a matter of state law.

Petitioner next argues that *Miller* establishes a substantive rule because the sentencer must now have the discretion to impose a range of sentences, including those with the possibility of parole. Pet. for Cert. at 9. Contrary to Petitioner's assertions, expanding the range of sentencing options does not fall within this Court's definition of a substantive rule. Petitioner argues that he "is serving a sentence that the state may not be able to impose upon him." Pet. for Cert. at 9. (Emphasis added.) This Court has unequivocally held that substantive rules will require that a defendant "face[] a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations omitted). Petitioner's argument does not

fall within this Court's description of a substantive rule because a juvenile who commits murder may still be subject to life without parole, consistent with *Miller* and the Eighth Amendment.

The sole mechanism for Petitioner to obtain success is for this Court to overrule *Teague's* definition of finality. If "[f]inality in the criminal law is an end which must always be kept in plain view," changing finality's very definition would blur it. *Mackey*, 401 U.S. at 690, Harlan J., concurring in judgments in part and dissenting in part (citations omitted).

This Court in *Teague* recognized that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [collateral]

proceeding, new constitutional commands." *Teague*, 489 U.S. at 310 (citations omitted). That frustration is increased when courts have not only faithfully applied existing constitutional law but have likewise faithfully interpreted this Court's definition of finality.[12] Petitioner's crime and initial trial took place before this Court's decision in *Linkletter v. Walker*, 381 U.S. 618 (1965).[13] Less

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[12] Justice Harlan opined:

> At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all.

Mackey v. United States, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); *Teague*, 489 U.S. at 321 n.3.

[13] The concept of finality has remained fluid throughout the history of this republic. From the founding through the 1950s, habeas corpus relief only applied to a criminal defendant's case that had become final where a state court judgment lacked jurisdiction. *Danforth*, 552 U.S. at 271–72 n.6; *see, e.g.*, *Harlan v. McGourin*, 218 U.S. 442, 447 (1910). Although

than twenty-five years later, that standard of finality was replaced by *Teague*. 489 U.S. at 301.[14] To again alter the test of finality would understandably frustrate the interest in finality that all share: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already

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this concept remained consistent throughout that period of time, the scope of questions that went to the jurisdiction of the court of conviction has crept constantly and steadily, covering more and more ground. *Danforth*, 552 U.S. at 271–72 n.6. The concept of jurisdiction eventually became a "fiction" by the middle of the twentieth century and was dropped altogether. *Id.* at 272 n.7 (citation omitted). Throughout the 1950s and until 1965, "'[n]ew' constitutional rules of criminal procedure were, without discussion or analysis, routinely applied to cases on habeas review." *Danforth*, 552 U.S. at 272.

[14] This Court correctly pointed out that at least the *Teague* standard has been an improvement over the "confusing 'retroactivity' cases decided in the years between 1965 and 1987." *Danforth*, 552 U.S. at 271.

resolved." *Mackey,* 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part); *see also Teague,* 489 U.S. at 309.

The Louisiana Supreme Court exhibited "conceptual faithfulness" as well as "decisional obedience" to this Court's opinions. *Desist v. United States,* 394 U.S. 244, 265 n.5 (1969) (Harlan, J., dissenting) (citation omitted). It determined that "because the *Miller* Court, like the Court in *Summerlin,* merely altered the ***permissible methods*** by which the State could exercise its continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole, we find its ruling is procedural, not substantive in nature." *Tate,* 130 So. 3d at 838 (emphasis in original and footnote omitted).

THE PRECEDENT UNDERLYING MILLER

Petitioner finally argues the "strands of precedent" referenced by this Court demand a finding of retroactivity. Pet. for Cert. at 10–13. They do not. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

The first strand of precedent discussed by the *Miller* Court principally involved *Graham v. Florida* and *Roper v. Simmons*. Both *Graham* and *Roper* are retroactive because they established categorical bans on a particular sentence: *Graham* banned life without parole for non-homicide crimes

committed by juveniles, and *Roper* banned the death penalty for all crimes committed by juveniles. *Graham v. Florida*, 560 U.S. 48, 75 (2010) (noting that "[c]ategorical rules tend to be imperfect, but one is necessary here"); *Roper v. Simmons,* 543 U.S. 551, 574 (2005) (describing the rule announced as "categorical").[15] These cases are retroactive by virtue of *Teague* precisely because they announced, categorically, the end of the imposition of a particular punishment on a certain class of persons. *See, e.g., In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (noting that *Graham*, *Roper*, and *Atkins*, are retroactive because they prohibit a certain category of punishment for a certain class of defendants because of their status or offense) (citing *Penry,* 492 U.S. at 330). The same is not true for *Miller*–"[o]ur

[15] *Miller,* 132 S. Ct. at 2463–67.

decision does not categorically bar a penalty for a class of offenders or type of crime..." 132 S.Ct. at 2471. Life without the possibility of parole remains a legal sentence for juvenile murderers.

The second strand of precedent discussed by this Court in *Miller* involved capital punishment cases that demanded individualized sentencing. *Miller,* 132 S. Ct. at 2463–64, 2467. Retroactivity of the underlying precedent leading to the announcement of a new constitutional rule has no effect on the new rule's retroactivity. None of the individualized sentencing capital cases discussed in *Miller* have been declared retroactive pursuant to *Teague*. *Carp*, 852 N.W.2d at 827–29 ("Carp has not succeeded in demonstrating that any of the individualized sentencing capital-punishment cases, i.e., *Furman, Woodson, Lockett, Eddings*, or

Sumner, have been applied retroactively under *Teague.*").[16]

Finally, this Court must consider the practical effect of a declaration of retroactivity. Juvenile murderers were convicted and sentenced decades prior to *Miller* in a manner consistent with the Eighth Amendment as it was interpreted at that time. Petitioner's murder took place over fifty years ago. Justice Harlan's observation in *Mackey* is very prescient:

> This drain on society's resources [by the grant of habeas relief] is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its

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[16] The Court in *Carp* also noted that "[n]either defendants nor the dissent has identified a single Supreme Court decision that has ever concluded that a noncategorical rule is entitled retroactive application under the first of *Teague's* two exceptions to the general rule of nonretroactivity." 852 N.W.2d 801, 827 n.16. Petitioner will not be able to produce such a case either.

> laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) (citation omitted).[17]

In this case, a hearing under Louisiana's *Miller* statute cannot produce a reliable picture of the circumstances of the offense or the character of the offender for a crime that occurred in 1963. The undersigned has been unable to locate a single prosecutor, defense attorney, or judge involved in either the first or second trial that is still living.

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[17] Petitioner's case became final before Justice Harlan made this observation and thirteen years before Frank Dean Teague's conviction became final. *See Teague,* 489 U.S. at 311.

The State suspects the same will hold true for all of the principal witnesses.[18] The outcome of such a hearing may be determined by which group of lawyers presents stale facts more effectively.

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[18] The State and Petitioner believed that the records of the appeals of this case, including the trial transcripts, were lost. However, upon information and belief, the State asserts that the Louisiana Supreme Court has discovered additional records relating to this case on microfilm including, hopefully, the transcripts of both trials. Neither the current lawyers for the State nor the Petitioner have seen the trial transcripts as of this writing, which would include the names of the principal witnesses.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

No. 14-280

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5,098 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2014.

/s/ Colin Clark